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8 NANCY LANOVAZ, on behalf of herself and  
9 all others similarly situated,

10 Plaintiff,

11 v.

12 TWININGS NORTH AMERICA, INC.,

13 Defendant.

14 Case No. C-12-02646-RMW

15 **ORDER GRANTING IN PART AND  
16 DENYING IN PART MOTION FOR  
17 CLASS CERTIFICATION,  
18 APPOINTMENT OF CLASS  
19 REPRESENTATIVE, AND  
20 APPOINTMENT OF CLASS  
21 COUNSEL**

22 [Re Docket Nos. 89; 107; 108; 118]

23 Plaintiff Nancy Lanovaz brings claims on her own behalf and on behalf of a purported class  
24 of tea purchasers against Twinings for its allegedly “misbranded” green, black, and white teas. She  
25 claims that Twinings’ tea labels and website<sup>1</sup> violate federal regulations, which California has  
incorporated into state law, and are misleading. Lanovaz now moves for class certification,  
appointment of class representative, and appointment of class counsel. Because Lanovaz has not  
presented a viable theory for monetary relief, the court denies the motion for class certification

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28 <sup>1</sup> The allegedly misleading statements on Twinings’ website have been removed, although the statements at issue still  
appear on the tea labels.

1 under Rule 23(b)(3), but grants the motion for class certification for injunctive relief only under  
 2 Rule 23(b)(2).<sup>2</sup>

## 3 I. BACKGROUND

### 4 A. Procedural History

5 Lanovaz alleges that she paid a premium for Twinings' green and black tea and would not  
 6 have purchased them but for Twinings' unlawful labeling. She asserts that Twinings violated  
 7 California's Unfair Competition Law ("UCL"), California's False Advertising Law ("FAL"), and  
 8 the Consumers Legal Remedies Act ("CLRA"). Dkt. No. 62, Third Amended Complaint ("TAC")  
 9 ¶¶ 157-215. Lanovaz seeks monetary and injunctive relief for herself and on behalf of a purported  
 10 class of tea purchasers who bought allegedly mislabeled products.<sup>3</sup> At the heart of Lanovaz's claim  
 11 is a label describing Twinings' tea as a "Natural Source of Antioxidants," which currently appears  
 12 on the 51 varieties of Twinings' tea at issue in this lawsuit. Twinings' green teas also include a  
 13 longer text description on the label, which states in relevant part, "[a] natural source of protective  
 14 antioxidants . . . Twinings' Green Teas provide a great tasting and healthy tea drinking experience."  
 15 Dkt. No. 70-2 (Stern Decl. Ex. B). Twinings' website also contained statements about antioxidants.

16 The gravamen of Lanovaz's complaint is that Twinings' labels violate U.S. Food and Drug  
 17 Administration ("FDA") labeling regulations and thus are illegal under California law, which has  
 18 adopted these regulations.<sup>4</sup> Although no one disputes that Twinings' tea contains flavonoids, a type  
 19 of antioxidant, the FDA does not allow nutrient content claims about flavonoids because the FDA  
 20 has not established a recommended daily intake for flavonoids. *See* 21 C.F.R. 101.54(g)(1).  
 21 Lanovaz argues that Twinings' labels and website are deceptive, misleading, and unlawful even if  
 22 they are technically true.

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24 <sup>2</sup> Because the court decides this motion on the damages issue, the court did not rely on the declarations of Julie Caswell  
 25 or Edward Scarbrough, and defendant's motions to strike those declarations are denied as moot. *See* Dkt. No. 107  
 (Motion to Strike Caswell Decl.); Dkt. No. 108 (Motion to Strike Scarbrough Decl.). The evidence submitted with the  
 Motion to Supplement, Dkt. No. 118, also has no impact on the damages issue, and the Motion to Supplement is denied  
 as moot.

26 <sup>3</sup> The proposed class is "All persons in the State of California who, since May 23, 2008, purchased Defendant's green,  
 black and white tea products."

27 <sup>4</sup> California Health & Safety Code section 110100(a) adopts "[a]ll food labeling regulations of the FDA and any  
 28 amendments to those regulations" and section 110670 provides that "[a]ny food is misbranded if its labeling does not  
 conform with the requirements for nutrient content or health claims as set forth in Section 403(r) (21 U.S.C. Sec. 343(r))  
 of the federal act and the regulations adopted pursuant thereto."

1        This court has issued three substantive orders in response to Twinings' motions to dismiss  
2 and motion for summary judgment. The first order struck, without prejudice, some of Lanovaz's  
3 claims. Dkt. No. 46. The second order struck all references from the complaint to sections of the  
4 website which Lanovaz did not read and on which she had not relied and dismissed all claims  
5 related to labeling of red tea because Lanovaz did not buy any red tea. Dkt. No. 60. Immediately  
6 after deposing the named plaintiff, Ms. Lanovaz, Twinings moved for summary judgment, primarily  
7 arguing that Ms. Lanovaz's deposition testimony proved that she did not rely on the antioxidant  
8 label when making her purchasing decisions. Dkt. No. 69. The court denied summary judgment,  
9 finding that reliance presented a material issue disputed fact. Dkt. No. 97.

10      Plaintiff now moves for class certification, Dkt. No. 89; Twinings opposes, Dkt. No. 101.

## 11                    II. ANALYSIS

12      Class certification is a matter within the discretion of the district court, *Zinser v. Accufix*  
13 *Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001), *amended by* 273 F.3d 1266 (9th Cir.  
14 2001), although the determination must be supported by sufficient factual findings, *Local Joint*  
15 *Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1161 (9th  
16 Cir. 2001), and a proper understanding of the applicable law, *Hawkins v. Comparet-Cassani*, 251  
17 F.3d 1230, 1237 (9th Cir. 2001).

18      Federal Rule of Civil Procedure 23(a) lists four conjunctive criteria that must be met to  
19 certify a class action: numerosity, commonality of issues, typicality of the representative plaintiffs'  
20 claims, and adequacy of representation. Fed. R. Civ. P. 23(a). A class may only be certified if the  
21 court is "satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied."  
22 *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982). The plaintiff bears the burden of  
23 demonstrating the requirements of Rule 23(a) are satisfied. *Hanon v. Dataproducts Corp.*, 976 F.2d  
24 497, 508 (9th Cir. 1992).

25      In addition to fulfilling the four prerequisites of Rule 23(a), a class action must also meet  
26 one of the disjunctive requirements of Rule 23(b) by satisfying the criteria set forth in at least one of  
27 the three types of class actions. Fed. R. Civ. P. 23. Plaintiff alleges that this class action may be  
28 maintained under either Rule 23(b)(2) or Rule 23(b)(3).

1                   **A. The Rule 23(a) requirements are met**

2                   Rule 23(a) requires that the class must, at a minimum, satisfy the requirements of  
 3                   numerosity, commonality, typicality, and adequacy of representation in order to maintain a class  
 4                   action. *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 588 (9th Cir. 2012); *see* Fed. R. Civ. P.  
 5                   23(a). Further, while Rule 23(a) is silent as to whether the class must be ascertainable, courts have  
 6                   held that the rule implies this requirement as well. *See, e.g., Herrera v. LCS Fin. Servs. Corp.*, 274  
 7                   F.R.D. 666, 672 (N.D. Cal. 2011).

8                   The parties do not dispute that the proposed class is sufficiently numerous or that plaintiff  
 9                   will be an adequate representative.

10                   **1. Ascertainability**

11                   A class is ascertainable if the class is defined with “objective criteria” and if it is  
 12                   “administratively feasible to determine whether a particular individual is a member of the class.”  
 13                   *See Wolph v. Acer America Corp.*, No. 09-01314, 2012 WL 993531, at \*1-2 (N.D. Cal. Mar. 23,  
 14                   2012) (certifying a class where “the identity and contact information for a significant portion of  
 15                   these individuals can be obtained from the warranty registration information and through Acer’s  
 16                   customer service databases”).

17                   Twinings argues that the proposed class lacks ascertainability because few, if any, company  
 18                   records exist to identify purchasers or which products they bought, and consumers did not keep  
 19                   receipts or product containers. This is not persuasive. Courts in the Ninth Circuit have certified  
 20                   many classes similar to the class proposed here. *See, e.g., Chavez v. Blue Sky Natural Beverage Co.*,  
 21                   268 F.R.D. 365, 377 (N.D. Cal. 2010) (beverages); *In re POM Wonderful, LLC Marketing and Sales*  
 22                   *Practices Litig.*, No. 10-02199 DDP RZX, 2012 WL 4490860 (C.D. Cal. 2012), *later decertified on*  
 23                   *other grounds*, *In re POM Wonderful LLC*, No. 10-02199 DDP RZX, 2014 WL 1225184 (C.D. Cal.  
 24                   Mar. 25, 2014) (juice products); *Guido v. L’Oreal, USA, Inc.*, No. 11-1067 CAS JCX, 2013 WL  
 25                   3353857 (C.D. Cal. July 1, 2013) (hair products); *Johns v. Bayer Corp.*, 280 F.R.D. 551, 560 (S.D.  
 26                   Cal. 2012) (multivitamins); *Ries v. Arizona Beverages USA, LLC*, 287 F.R.D. 523, 536 (N.D. Cal.  
 27                   2012) (tea products); *Delarosa v. Boiron, Inc.*, 275 F.R.D. 582, 595 (C.D. Cal. 2011) (homeopathic  
 28                   products); *Johnson v. Gen. Mills, Inc.*, 275 F.R.D. 282, 286 (C.D. Cal. 2011) (yogurt products);

1       *Rivera v. Bio Engineered Supplements & Nutrition, Inc.*, No. 07-1306 JVS RNBX, 2008 WL  
2       4906433 (C.D. Cal. Nov. 13, 2008) (nutritional supplements).

3       Further, Judge Bernal of the Central District of California recently explained that “[i]n this  
4       Circuit, it is enough that the class definition describes a set of common characteristics sufficient to  
5       allow a prospective plaintiff to identify himself or herself as having a right to recover based on the  
6       description.” *McCrary v. The Elations Co., LLC*, 2014 U.S. Dist. LEXIS 8443, at \*25 (C.D. Cal.  
7       Jan. 13, 2014); *see also Astiana v. Kashi Co.*, 291 F.R.D. 493, 500 (S.D. Cal. 2013) (“As long as the  
8       class definition is sufficiently definite to identify putative class members, the challenges entailed in  
9       the administration of this class are not so burdensome as to defeat certification.”) (quotation and  
10       alteration omitted). The alternative would be the death of consumer class actions. *See Ries*, 287  
11       F.R.D. at 535 (holding that consumers’ failure to retain receipts does not defeat ascertainability  
12       because otherwise “there would be no such thing as a consumer class action”); *Astiana*, 291 F.R.D.  
13       at 500 (“If class actions could be defeated because membership was difficult to ascertain at the class  
14       certification stage, ‘there would be no such thing as a consumer class action.’”) (quoting *Ries*, 287  
15       F.R.D. at 536). As the class here is defined with “objective criteria” and it is “administratively  
16       feasible to determine whether a particular individual is a member of the class,” *see Wolph*, 2012 WL  
17       993531, at \*1-2, the Court finds that plaintiff’s proposed class definition meets the ascertainability  
18       requirement.

19       **2. Commonality and Typicality**

20       To satisfy Rule 23(a)’s commonality requirement, a class claim “must depend upon a  
21       common contention . . . of such a nature that it is capable of classwide resolution—which means  
22       that determination of its truth or falsity will resolve an issue that is central to the validity of each one  
23       of the claims in one stroke.” *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). As the  
24       Supreme Court explained in *Dukes*, the key consideration in assessing commonality is “not the  
25       raising of common questions—even in droves—but, rather, the capacity of a classwide proceeding  
26       to generate common answers apt to drive the resolution of the litigation.” *Id.* (internal citations and  
27       quotation omitted; emphasis in original).

1 Twinings makes a number of overlapping arguments under the headings of commonality,  
2 typicality, and predominance. The commonality requirement of Rule 23(a)(2) is construed less  
3 rigorously than the “predominance” requirement of Rule 23(b)(3). *Hanlon v. Chrysler Corp.*, 150  
4 F.3d 1011, 1019 (9th Cir.1998). For purposes of Rule 23(a)(2), a perfect identity of facts and law is  
5 not required; relatively “minimal” commonality will do. *Id.* at 1019–20. “The existence of shared  
6 legal issues with divergent factual predicates is sufficient, as is a common core of salient facts  
7 coupled with disparate legal remedies within the class.” *Id.* at 1020.

8 (a) Plaintiff is a member of the proposed class as to products that are  
9 substantially similar to those she purchased

10 Plaintiff’s proposed class includes 51 Twinings products. Plaintiff has purchased 6 of those  
11 products. Twinings argues that plaintiff cannot include the 45 unpurchased products in her class  
12 definition.

13 Twinings bases its typicality challenge on Judge Davila’s decision in *Major v. Ocean Spray*  
14 *Cranberries, Inc.*, 5:12-CV-03067 EJD, 2013 WL 2558125, at \*4 (N.D. Cal. June 10, 2013).  
15 However, the *Major* case involved unique facts that justified the court’s finding that typicality was  
16 lacking in that case. In *Major*, the proposed class was “broad and indefinite,” as it “would [have]  
17 include[d] any of Defendant’s products represented to contain no artificial colors, flavors or  
18 preservatives but which contained artificial colors, flavors or preservatives.” *Id.* The *Major* plaintiff  
19 sought to include entire product lines based on a single purchase, and the plaintiff “fail[ed] to link  
20 any of those products to any alleged misbranding issue” related to the plaintiff’s purchase. *Id.*  
21 Furthermore, the *Major* court observed “that the labels and nutrition claims on each of Defendant’s  
22 products may be unique to that product itself.” *Id.* The plaintiff purchased a pomegranate blueberry  
23 drink and alleged misrepresentations based on label language making specific claims about  
24 blueberries. Yet the plaintiff sought to certify a class that would include products having label  
25 statements making no claims about blueberries. As the *Major* court explained, “[t]he evidence  
26 needed to prove Plaintiff’s claim that the Diet Sparkling Pomegranate Blueberry drink contained  
27 false or misleading labeling is not probative of the claims of unnamed class members who  
28 purchased products within the ‘Sparkling’ line that did not contain blueberries.” *Id.*

In the instant case, all products included in the proposed class definition, including the product Lanovaz purchased, have “natural source of antioxidants” label statements and are made from the same type of tea plant. Therefore, rather than raising the problems encountered in *Major*, this case is much more similar to the multiple cases in this Circuit in which courts have found the typicality requirement met, even when the representative plaintiff did not purchase every accused product. *See, e.g., Astiana*, 291 F.R.D. at 502-03; *Ries*, 287 F.R.D. at 539-40; *Chavez*, 268 F.R.D. at 377-78. The Court thus that Lanovaz’s claims are typical of the proposed class.

(b) Materiality can be proven by common evidence

Twinings argues that “natural source of antioxidants” has no common meaning, and therefore an individualized inquiry as to materiality is required. Resolving this question requires some discussion of California consumer protection law. For Lanovaz’s “unlawful” and “deception” claims, Lanovaz must prove that the allegedly unlawful or deceptive label statement was material. “A representation is ‘material,’ . . . if a reasonable consumer would attach importance to it or if ‘the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action.’” *Hinojos v. Kohl’s Corp.*, 718 F.3d 1098, 1107 (9th Cir. 2013) (quoting *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 330 (2011)) (emphasis in original). Moreover, the Supreme Court in *Amgen* held that “[b]ecause materiality is judged according to an objective standard, the materiality of [defendant’s] alleged misrepresentations and omissions is a question common to all members of the class [plaintiff] would represent.” *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 133 S. Ct. 1184, 1191 (2013). As materiality is an objective inquiry, no individualized examination of materiality is necessary. To establish materiality, Lanovaz need only prove that a reasonable consumer would attach importance to Twinings’ antioxidant statements, or that Twinings knows or has reason to know that its consumers are likely to regard the label statements as important in making purchasing decisions. This question is common to the class.

**B. Certification under Rule 23(b)(2) for injunctive relief only**

Rule 23(b)(2) allows class treatment when “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding

1 declaratory relief is appropriate respecting the class as a whole.” Plaintiff asks for an injunction  
2 requiring Twinings to “immediately cease and desist from selling its Misbranded Food Products in  
3 violation of law; enjoining Defendant from continuing to market, advertise, distribute, and sell these  
4 products in the unlawful manner described herein; and ordering Defendant to engage in corrective  
5 action.” Dkt. No. 62 53, ¶ C.

6 If the class is certified under Rule 23(b)(2), none of the class members would receive an  
7 individualized award of monetary damages. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2557  
8 (2011). Judge Seeborg explained this fully in another food mislabeling class action:

9 This case exemplifies the kind of action that may be appropriate for  
10 certification under Rule 23(b)(2), at least insofar as plaintiffs request: (1)  
11 declaratory relief that the alleged practices are unlawful, and (2) injunctive  
12 relief prohibiting defendants from continuing them. . . .

13 Rule 23(b)(2) “does not authorize class certification when each class  
14 member would be entitled to an individualized award of monetary  
15 damages.” *Dukes*, 131 S.Ct. at 2557. Although plaintiffs characterize  
16 restitution as a form of equitable relief, rather than for monetary damages,  
17 whether the monetary relief is understood as legal damages or an equitable  
18 remedy is irrelevant to this analysis. *See id.* Of course, monetary recovery  
19 is not entirely prohibited in the (b)(2) class context. For example, class  
20 claims for statutory or punitive damages that do not turn on the individual  
21 circumstances of class members may be sufficiently “incidental” to  
22 warrant certification under (b)(2). By contrast, here plaintiffs seek  
23 individualized awards of monetary restitution which would require  
24 individualized assessments of damages based on how many products the  
class member had bought. *See In re Flash Memory Antitrust Litig.*, No.  
07-0086, 2011 WL 1301527, at \*7 (N.D. Cal. Mar. 31, 2011) (“Because  
the restitution amount is dependent on the particular purchases made ...  
monetary relief will dictate the key procedures utilized in this case and  
require individualized inquiries and hearings.”). Even though plaintiffs’  
claim for disgorgement could be subject to common proof because the  
amount of damages could be calculated based on overall beverage sales,  
rather than sales to individual consumers, it would still be unmanageable  
under Rule 23(b)(2), which lacks Rule 23(b)(3)’s notice and opt-out  
requirements designed to facilitate the award of monetary damages to  
individual class members. *See Dukes*, 131 S.Ct. at 2559.

25 Furthermore, although the monetary amount sought may be small per class  
26 member, in the aggregate they can hardly be said to be incidental to the  
27 injunctive relief sought. Although plaintiffs describe their pursuit of  
28 monetary relief as secondary to their desire for corrective advertising and  
cessation of the allegedly deceptive labeling practices when arguing for  
class certification, based on the entire record in this case it is clear the  
monetary relief predominates. “Plaintiffs clearly state that the crux of their

1 claims is that [they] paid artificially-inflated prices for [Twinings Tea]”  
2 because it was labeled as all natural. *In re Flash Memory Antitrust Litig.*,  
2011 WL 1301527, at \*7.

3 *Ries v. Arizona Beverages USA LLC*, 287 F.R.D. 523, 541-42 (N.D. Cal. 2012), appeal dismissed  
4 (Jan. 25, 2013) (injunctive class later decertified for failure to diligently prosecute the action, *see*  
5 2013 WL 1287416 (N.D. Cal. Jan. 6 2014)).

6 Based on the explanation above, the class certification is granted under Rule 23(b)(2) for the  
7 purposes of declaratory and injunctive relief and denied to the extent plaintiffs seek monetary  
8 damages, including restitution, refund, reimbursement and disgorgement. *Id.*

9 **C. Plaintiff must present a legally relevant damages model under Rule 23(b)(3)**

10 In order to certify a class under Federal Rule of Civil Procedure 23(b)(3), plaintiff must  
11 show that monetary relief resulting from the defendants’ conduct is measurable “on a class-wide  
12 basis through use of a common methodology.” *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1430  
13 (2013) (internal quotations omitted) (rejecting class certification where only damages model  
14 accounted for four possible antitrust violations when district court had limited case to single  
15 actionable antitrust violation). The plaintiff’s damages “model purporting to serve as evidence of  
16 damages in this class action must measure only those damages attributable to [the defendant’s  
17 conduct]. If the model does not even attempt to do that, it cannot possibly establish that damages are  
18 susceptible of measurement across the entire class for purposes of Rule 23(b)(3). Calculations need  
19 not be exact . . . but at the class-certification stage (as at trial), any model supporting a plaintiff’s  
20 damages case must be consistent with its liability case . . . .” *Id.* at 1433 (internal citations and  
21 quotations omitted).

22 *Comcast* has been interpreted as “reiterate[ing] a fundamental focus of the Rule 23 analysis:  
23 The damages must be capable of determination by tracing the damages to the plaintiff’s theory of  
24 liability. However, so long as the damages can be determined and attributed to a plaintiff’s theory of  
25 liability, damage calculations for individual class members do not defeat certification.” *Lindell v.*  
26 *Synthes USA*, 11-CV-02053-LJO-BAM, 2014 WL 841738 (E.D. Cal. Mar. 4, 2014). The Ninth  
27 Circuit has also restated this rule post-*Comcast*, noting that “plaintiffs must be able to show that  
28

1 their damages stemmed from the defendant's actions that created the legal liability." *Leyva v.*  
 2 *Medline Indus., Inc.*, 716 F.3d 510, 514 (9th Cir. 2013).

3 Applying *Comcast* to this case, the court first considers what damages are recoverable as a  
 4 result of Twinings' alleged mislabeling and then considers whether Lanovaz has presented a  
 5 damages model capable of isolating those damages.

6 **D. Lanovaz Has Not Presented a Sufficient Damages Model Under *Comcast***

7 **1. Lanovaz's damages are limited to the price premium paid as a result of  
 8 Twinings' allegedly misleading statements**

9 The False Advertising Law, the Unfair Competition Law, and the CLRA authorize a trial  
 10 court to grant restitution to private litigants asserting claims under those statutes. *Colgan v.*  
 11 *Leatherman Tool Grp., Inc.*, 135 Cal. App. 4th 663, 694 (2006). Restitutionary relief is an equitable  
 12 remedy, and its purpose is "to restore the status quo by returning to the plaintiff funds in which he or  
 13 she has an ownership interest." *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1149  
 14 (2003); *see also Cortez v. Purolator Air Filtration Products Co.*, 23 Cal. 4th 163, 177 (2000).

15 The proper measure of restitution in a mislabeling case is the amount necessary to  
 16 compensate the purchaser for the difference between a product as labeled and the product as  
 17 received. *Colgan*, 135 Cal. App. 4th at 700 (rejecting restitutionary award for products "Made in  
 18 U.S.A." where expert "did not attempt to quantify either the dollar value of the consumer impact or  
 19 the advantage realized by Leatherman."); *In re POM Wonderful LLC*, No. 10-02199 DDP RZX,  
 20 2014 WL 1225184, at \*3 (C.D. Cal. Mar. 25, 2014) (rejecting a full refund model because  
 21 consumers benefited from consumption of the defendant's products). This calculation contemplates  
 22 the production of evidence that attaches a dollar value to the "consumer impact or advantage"  
 23 caused by the unlawful business practices. *Id.* Restitution can then be determined by taking the  
 24 difference between the market price actually paid by consumers and the true market price that  
 25 reflects the impact of the unlawful, unfair, or fraudulent business practices. *See, e.g., Astiana v. Ben*  
 26 *& Jerry's Homemade, Inc.*, C 10-4387 PJH, 2014 WL 60097 at \*12-13 (N.D. Cal. Jan. 7, 2014)  
 27 (denying class certification for "all natural" ice cream labels based in part on insufficient proof of  
 28 damages).

1 Applying *Colgan* to this case, plaintiff must provide substantial evidence showing the price  
 2 premium attributable to Twinings use of the label “Natural Source of Antioxidants.” *Colgan* at 699  
 3 (requiring substantial evidence to support award of restitution).

4 **2. Dr. Capps has not provided a damages model capable of linking a price  
 5 premium to the allegedly misleading statements**

6 Plaintiff’s damages expert, Dr. Oral Capps, provided a declaration proposing three models  
 7 for measuring damages. *See* Dkt. No. 91-8 (Capps Decl.). First, Dr. Capps proposed refunding the  
 8 entire purchase or “register” price of the tea. Capps Decl. ¶¶ 8-10. As discussed above, this is not  
 9 the proper measure of damages. Dr. Capps then proposed two methods of determining the price  
 10 difference between teas with the “Natural Source of Antioxidants” label and those without.

11 First is the “benefit of the bargain” rule or price premium model. *Id.* ¶ 12. Under this  
 12 approach, Dr. Capps would compare the price of Twinings tea to the price of “comparable” products  
 13 that do not have the antioxidant label. *Id.* ¶ 15. Dr. Capps has no way of linking the price difference,  
 14 if any, to the antioxidant label or controlling for other reasons why “comparable” products may have  
 15 different prices. *See* Dkt. No. 114-6 (Capps Reply Decl.) ¶¶ 14-15 (explaining that Lanovaz did not  
 16 claim that the price of tea depends on the antioxidant label and that a price premium might not be  
 17 attributable to antioxidant claims). As Judge Pregerson summarized in the *POM* case, “the Price  
 18 Premium model simply calculates what the price difference [is]. This damages ‘model’ does not  
 19 comport with *Comcast*’s requirement that class-wide damages be tied to a legal theory . . . .” *POM*,  
 20 2014 WL 1225184, at \*5. Thus, the “benefit of the bargain” method is not a legally sufficient  
 21 method of calculating damages and does not comply with Rule 23.

22 The second method is an “econometric or regression analysis.” *Id.* ¶ 16. This method would  
 23 allow Dr. Capps to “estimate[e] the portion of sales gleaned by Twinings as a result of the false and  
 24 misleading use of the term “Natural Source of Antioxidants” on its tea products.” *Id.* This method  
 25 might arrive at a legally relevant damages analysis, because it “can be translated into the percentage  
 26 of sales attributed specifically to the claims made by the Defendant.” *Id.* ¶ 22.

1 Plaintiffs run into a problem with their regression analysis. In Dr. Capps' reply declaration,  
 2 he expressly abandons a regression analysis as a method of calculating damages in this case. Dr.  
 3 Capps states:

4 In light of the evidence provided by the President of Twining North  
 5 America, Inc. that statement about antioxidants have been on packages of  
 6 green and black teas since 2003, indeed the use of regression or  
 7 econometric analysis to assess class-wide or aggregate damages is ruled  
 8 out. That is, the antioxidant claims have been on the labels over the entire  
 9 class period. Hence, it is not possible in this case to invoke a regression  
 10 analysis approach because of the lack of any variable in sales or units sold  
 11 attributed to the antioxidant claims.

12 Capps Reply Decl. ¶ 20.<sup>5</sup>

13 Without a regression analysis, plaintiffs do not present any damages model capable of  
 14 estimating the price premium attributable to Twinings' antioxidant labels. Because the price  
 15 premium attributable to the antioxidant labels is the only legally permissible measure of damages,  
 16 *see Colgan*, plaintiff has failed to satisfy the requirements for class certification under *Comcast*.

#### 17 **E. Appointment of Class Counsel and Class Representative**

18 Under Rule 23(c), "An order certifying a class action . . . must appoint class counsel under  
 19 Rule 23(g)." Fed. R. Civ. P. 23(c)(1)(B). Rule 23(g) directs a court appointing class counsel to  
 20 consider: "(i) the work counsel has done in identifying or investigating potential claims in the  
 21 action, (ii) counsel's experience in handling class actions, other complex litigation, and claims of  
 22 the type asserted in the action, (iii) counsel's knowledge of the applicable law, (iv) the resources  
 23 counsel will commit to representing the class." Fed. R. Civ. P. 23(g)(1)(A).

24 Plaintiff has requested that the firms of Pratt & Associates, Coleman Law Firm, and Barrett  
 25 Law Group, P.A. be appointed as Class Counsel. Twinings does not object. These firms have  
 26 undertaken the responsibilities on behalf of the class, and pursued the litigation on behalf of Plaintiff  
 27 and the proposed class. The Court finds that Pierce Gore of Pratt & Associates, J. Price Coleman of  
 28 Coleman Law Firm, and Brian Herrington of Barrett Law Group, P.A. are qualified to serve as Class  
 Counsel, and hereby appoints them as such.

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5 Although Dr. Capps only indicates that the labels on black and green teas did not change during the class period, he appears to have ruled out applying a regression analysis to white tea as well. *Id.* (" . . . it is not possible in this case to invoke a regression analysis approach")

1 Plaintiff Nancy Lanovaz is appointed as class representative. Plaintiff is a member the class,  
 2 there are no conflicts between her and other Class members, and, based on the record before the  
 3 Court, the plaintiff has demonstrated an ability and willingness to prosecute this litigation  
 4 vigorously.

5 **III. ORDER**

6 For the reasons stated above, the court GRANTS IN PART AND DENIES IN PART the  
 7 motion for class certification.

8 The following class is certified under Rule 23(b)(2) for the purposes of injunctive and  
 9 declaratory relief only:

10 All persons in the State of California who, since May 23, 2008, purchased  
 11 Defendant's green, black and white tea products.

12 The following persons are expressly excluded from the Class: (i) Defendant and its  
 13 subsidiaries and affiliates; (ii) all persons who make a timely election to be excluded from the  
 14 proposed Class; (iii) governmental entities; and (iv) the Court to which this case is assigned and its  
 15 staff.

16 Plaintiff NANCY LANOVAZ is hereby designated and appointed as representative for the  
 17 class on all claims asserted on behalf of the class.

18 The following attorneys are designated and appointed as Class Counsel: Pierce Gore of Pratt  
 19 & Associates, J. Price Coleman of Coleman Law Firm, and Brian Herrington of Barrett Law Group,  
 20 P.A.

21  
 22  
 23 Dated: April 24, 2014  
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 23 RONALD M. WHYTE  
 24 United States District Judge